

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 32

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION (PACIFIC CRANE
MAINTENANCE COMPANY, INC.),

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS, AFL-
CIO, DISTRICT LODGE 190, LOCAL LODGE 1546
AND DISTRICT LODGE 160

Case No. 32-CB-005932

RESPONDENT ILWU'S ANSWERING BRIEF TO THE CHARGING PARTIES'
EXCEPTIONS TO THE ALJ'S DECISION

I. INTRODUCTION

Despite the Administrative Law Judge's complete adoption of the Second Amended Compliance Specification and the Charging Parties' failure to challenge the Compliance Specification under the Board's procedures for charging parties to challenge compliance determinations, the Charging Parties have lodged specious exceptions to the ALJ's decision. As the time for the Charging Parties' to challenge the Compliance Specification has long passed, the Charging Parties actions here are nothing but a blatant effort to become "aggrieved parties" in the event that the Board adopts the ALJ's decision. Such procedural gamesmanship should not be tolerated. Respondent ILWU, therefore, respectfully requests that the Board not only reject the Charging Parties' exceptions, but also issue a finding that the Charging Parties are not aggrieved by the ALJ's decision.

II. RELEVANT PROCEDURAL HISTORY

On August 5, 2019, the Regional Director for Region 32 of the National Labor Relations Board (hereinafter "Regional Director") issued a Compliance Specification and Notice of Hearing, in which 201 current and former employees were identified to receive reimbursement of dues and in which the Regional Director did not seek a new "special remedy prohibiting the ILWU from receiving any of the dues back from any of the workers." The Charging Parties did not appeal this compliance determination to the General Counsel or otherwise lodge any objections to it.

On October 22, 2019, the Regional Director issued an Amended Compliance Specification and Notice of Hearing, in which 152 current and former employees were identified to receive reimbursement of dues and in which the Regional Director did not seek a new "special remedy prohibiting the ILWU from receiving any of the dues back from any of the workers." The Charging Parties did not appeal this compliance determination to the General Counsel or otherwise lodge any objections to it.¹

¹ ILWU counsel were informed by counsel for the General Counsel that the Charging Parties agreed to the Amended Compliance Specification. However, that consent is not noted in the pleading. *See* Tr. 204-05 (Counsel for the Charging Parties affirming that the Charging Parties "agreed to eliminate casuals," one of the changes made between the Original Compliance Specification and First Amended Compliance Specification).

On January 21, 2020, counsel for the General Counsel filed a motion to amend the Amended Compliance Specification, which “decrease[d] Respondent International Longshore and Warehouse Union[’s] overall liability alleged by the General Counsel.” The motion to amend stated that, “Charging Party International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, Local Lodge 1546 and District Lodge 16 has reviewed Counsel for the General Counsel’s proposed amendment and does not have any objection to the proposed amendment.” The Charging Parties did not file an opposition to the motion to amend and, on January 27, 2020, the Administrative Law Judge granted the motion. Later that day, the Regional Director issued the Amendment to the Amended Compliance Specification. The Charging Parties did not appeal this compliance determination to the General Counsel or otherwise lodge any objections to it.

On February 12, 2020, eight days after the close of the hearing, the Regional Director issued a Second Amended Compliance Specification in which 130 current and former employees were identified to receive reimbursement of dues and in which the Regional Director did not seek a new “special remedy prohibiting the ILWU from receiving any of the dues back from any of the workers.” While Respondent ILWU opposed Counsel for the General Counsel’s further amendment at hearing, in its post hearing brief, and in its exceptions to the Board, the Charging Parties did not oppose this amendment nor did they appeal this compliance determination to the General Counsel.

Throughout the compliance hearing, counsel for the Charging Parties conceded in all official statements at hearing that he was not challenging the Regional Director’s compliance determination, even though his client believed that all 666 employees who may have performed a single day of “unit work” should have their dues reimbursed. *See, e.g.* Charging Parties’ Opening Statement:

So there's no escaping the fact that if somebody was in the unit for a day and the PMA deducted dues, they have to be reimbursed. The General Counsel in applying this formula has violated what was the Board's order and the D.C. circuit enforcing the Board's order. Nonetheless, we're not here contesting -- I'm not going to put on

evidence that the others should have the monies reimbursed, because we want to get this case done after now 15 years.

Tr. 22; *see, accord*, Charging Parties' Position on Second Amended Compliance Specification:

JUDGE LAWS: All right. Does the Charging Party have any objection to the proposed amendment?

MR. ROSENFELD: No. We support the proposed amendment.

Tr. 212. Rather, it was only in emotional outbursts during speaking objections that counsel for the Charging Parties indicated that he might belatedly object to the Regional Director's compliance determination. *See, e.g.* Tr. 136.

On May 18, 2020, for the first time, the Charging Parties lodged their purported objections to the Regional Director's compliance determination in their post-hearing brief. As they assert in their exceptions, the Charging Parties argued that the compliance determination was unreasonable because it violated the Board Order for failing to demand reimbursement of dues from all 666 employees who worked a single shift at an APMT terminal and that the ALJ should recommend that the Board in compliance issue an entirely new remedy "prohibiting the ILWU from asking bargaining unit members to return any portion of the dues reimbursement and from accepting any waiver, forbearance or return of the dues remedy."

The Administrative Law Judge rejected the Charging Parties' belated arguments:

The Charging Party contends that any employee who worked at least one day should be reimbursed because, under the terms of the PMA–ILWU Agreement they were required to pay either membership dues or a hiring hall fee. Recourse for a charging party who disagrees with any aspect of the Regional Director's determination in a compliance specification is to file an appeal with the General Counsel in Washington, DC, and if the appeal is denied, request Board review. *See* Sec. 102.53 of the Boards Rules and Regulations; *Ace Beverage Co.*, 250 NLRB 646, 647 (1980). The purpose of the review process in Sec. 102.53 is to resolve disputes between the Charging Party and the General Counsel before the hearing. *See Mike-Sells Potato Chip Co.*, 366 NLRB No. 29 (2018), *enfd.* 761 Fed. Appx. 5 (D.C. Cir. 2019). The Charging Party's argument in post-hearing brief therefore fails.

ALJD at 11. The ALJD did not specifically address the new remedy the Charging Parties now seek, however, no such remedy was recommended. *Id.*

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III. ARGUMENT

A. The ALJ Correctly Rejected the Charging Parties Belated Efforts to Object to the Regional Director's Compliance Determination and to the Board Ordered Remedy.

The procedure for a charging party to challenge a compliance determination is well established. Under Rules & Regulations Section 102.53(a), 29 C.F.R. § 102.53(a), “[t]he Charging Party may appeal a compliance determination to the General Counsel in Washington, DC, within 14 days of the written statement of compliance determination as set forth in §102.52.” If the General Counsel affirms the compliance determination, “the Charging Party may file a request for review of that decision with the Board in Washington, DC.” *Id* at § 102.53(c); *see accord* Case Handling Manual, Compliance § 10600. “The charging party may not seek to add, at the compliance stage, remedies that were no[t] ordered at the “merits” stage.” *CHM*, § 10600. The only procedure by which a charging party may challenge the Regional Director’s compliance determination is by appealing the determination under § 102.53, not in post-compliance hearing briefs or in exceptions to an ALJ decision. *See Hanson Aggregates Bmc, Inc. & Int’l Union of Operating Engineers, Local 542*, No. S 04-CA-033330, 04-C, 2013 WL 1154233, at *2-4 (Mar. 19, 2013); *Comar, Inc. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union*, No. 4-CA-28570, 2011 WL 814993, at *1-2 (Feb. 22, 2011); *Hanson Aggregates Bmc, Inc. & Int’l Union of Operating Engineers, Local 542*, No. S 04-CA-033330, 04-C, 2013 WL 1154233, at *2-4 (Mar. 19, 2013); *Int’l All. of Theatrical Stage Employees & Moving Picture Operators of, Local 720*, 352 NLRB 29, 30 (2008); *In Re Int’l Bus. Machines Corp. & Commc’ns Workers of Am., Local 1120*, 339 NLRB 966, 966 (2003); *Page Litho, Inc.*, 325 NLRB 338, 338 (1998).

Here, not only did the Charging Parties not appeal any of the Compliance Specifications issued by the Regional Director, all of which did not require reimbursement of dues for all 666 employees who may have worked a single shift at an APMT terminal and did not seek to impose a new remedy against the ILWU, but the Charging Parties affirmatively agreed to and accepted the First Amended and Second Amended Compliance Specifications. Accordingly, the Charging

Parties' exceptions are nothing more than a baseless effort to appear aggrieved by the ALJ's decision, when in fact they are not. For this reason alone, the Charging Parties' exceptions must be overruled.

B. Even if Properly Before the Board, the Charging Parties' Exceptions are Meritless.

For the reasons set forth in the ILWU's exceptions briefs, the formula proposed by the Charging Parties to require reimbursement of dues to employees who worked but a single shift at an APMT terminal for PCMC over periods of 13 or 16 years is even less reasonable than the formula advanced by the Regional Director and adopted by the Administrative Law Judge, and even if properly before the Board, should be denied.

Additionally, the Charging Parties' request that the Board should, in compliance, issue a new remedy against the ILWU "prohibiting the ILWU from asking bargaining unit members to return any portion of the dues reimbursement and from accepting any waiver, forbearance or return of the dues remedy" must be rejected. Not only is this remedy **not** included in the enforced, Board order on liability, but it further has no support in Board law. Notably, the Charging Parties cite no authority to support the new remedy they seek, nor the ability of the Board to add a new remedy at the current procedural posture. Specifically, the Board cannot prohibit employees receiving reimbursement in compliance from expending the money they receive as they see fit. The Board has no jurisdiction over the employees to require them to use the money they receive in any particular way. Employees who receive money are free to use the money for their own personal reasons (like mortgage, rent, tuition, savings, etc.), for donations to political campaigns² or charities, or for donations to a union. The Board cannot order them otherwise. Nor can the Board order the ILWU not to accept money from its members and pensioners. Money is fungible – ILWU has no way of knowing the source of funds donated to the Union, nor could it. ILWU does not violate the Board order by accepting money from its members and pensioners in the normal course

² Despite the presumed wishes of counsel for the Charging Parties, the Board cannot restrict any such individuals from donating money to a political campaign or cause he does not support. *See* Tr. 251 ("MR. ROSENFELD: Except under Trump man."); Tr. 296 ("MR. ROSENFELD: I'd like make a motion that the board supporting impeaching Donald Trump.").

of business. ILWU further does not violate the Board order by asking its members to donate to the Union. Therefore, even if properly brought to the Board, the Charging Parties' exception to add a new remedy to the enforce Board order on liability must be rejected.³

IV. CONCLUSION

For the foregoing reasons, ILWU respectfully requests that the Board overrule the Charging Parties' exceptions to the ALJ decision and further order that the Charging Parties are not aggrieved by the fact that the Regional Director's compliance determination and ALJ's decision did not provide for reimbursement of dues for certain individuals and did not seek or recommend issuance of a new remedy against the ILWU.

Dated: September 4, 2020

Respectfully submitted,
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³ To the extent the Charging Parties are asserting that unclaimed money should not revert back to the ILWU, that assertion must also be rejected. There is no basis to depart from established Board law and practice on the extinguishment of backpay entitlement. *See* CHM, Compliance, §10584, *citing Starlite Cutting*, 284 NLRB 620 (1987), clarifying 280 NLRB 1071 (1986); and *Groves Truck & Trailer*, 295 NLRB 1 fn. 3 (1989).

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA 94109. I hereby certify that on **September 4, 2020**, I caused the foregoing document(s):

RESPONDENT ILWU'S ANSWERING BRIEF TO THE CHARGING PARTIES' **EXCEPTIONS TO THE ALJ'S DECISION**

to be filed electronically with the National Labor Relations Board, and a true and correct copy of the same was served on all interested parties in this action as follows:

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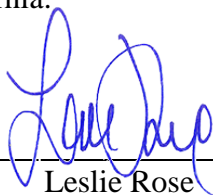
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- ☒ **BY E-MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 4, 2020**, at San Francisco, California.



Leslie Rose